amo REPORT

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88-13 AMO RESPONSE TO BILL 174 THE INTERVENOR FUNDING PROJECT ACT, 1988

THE ASSOCIATION OF MUNICIPALITIES OF ONTARIO

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ASSOCIATION OF MUNICIPALITIES OF ONTARIO

The Association of Municipalities of Ontario, a non-partisan voluntary organization, is united to promote the values of the municipal government system and the status of the municipal level of government as a vital and essential component of the total inter-governmental framework of Ontario and Canada.

The Association acts as the collective voice of Ontario's municipal governments and is organized to accomplish through cooperation and coordination, what the majority have neither the time nor the resources to do individually.

The Association represents some seven hundred (700) municipal governments throughout Ontario. The governing body is composed of some eighty (80) municipal elected and appointed officials, who in turn represent a wide-range of municipal government interests.

The following sections and affiliated municipal professional associations form part of the Association's structure, and therefore play an important role in its activities through the Board of Directors and program and policy development:

Association Sections

* County and Regional Section
* Large Urban Section
* Northern Ontario Section (FONOM/NOMA)
* Rural Section (ROMA)
* Organization of Small Urban Municipalities (OSUM)

Association Affiliates:

* Association of Municipal Clerks and Treasurers of Ontario
* Association of Municipal Tax Collectors of Ontario
* Municipal Engineers Association
* Ontario Municipal Administrators Association
* Ontario Municipal Personnel Association
* Ontario Municipal Social Services Association
* Society of Directors of Municipal Recreation of Ontario
* Urban Finance Officers Association of Ontario

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EXECUTIVE SUMMARY

Bill 174, An Act for the establishment and conduct of a Project to provide Funding to Intervenors in proceedings before a Joint Board under the Consolidated Hearings Act, 1981 and before the Ontario Energy Board and the Environmental Assessment Board and to provide for certain matters in relation to costs before those Boards (Intervenor Funding Project Act, 1988), was introduced in June 1988.

Bill 174 is designed to give some structure to what has to this point been an ad hoc process of funding intervenors before certain administrative hearing boards. The principle purpose of the bill is to establish a mechanism by which intervenor funding can be provided to eligible intervenors, facilitating their participation in hearings before the Environmental Assessment Board, the Ontario Energy Board, and Joint Boards under the Consolidated Hearings Act. A Hearing Panel will consider applications for funding using criteria set out in the bill. Intervenors who are eligible will be funded by proponent(s) identified by the Panel.

Bill 174 also introduces some changes with respect to the awarding of costs at the conclusion of hearings. The Environmental Assessment Board is empowered under the bill to now award costs, and all three boards may now use considerations different from those used in the courts in the awarding of costs.

The Association of Municipalities of Ontario has previously recommended that intervenor funding be administered primarily through post-hearing costs awards, and that any funding of intervenors come from a fund established by the ministry responsible for the legislation under which the hearing is being held. With respect to Bill 174, the Association reaffirms this position. Additionally, the Association notes that, should Bill 174 become legislation, municipalities could be excluded from being considered eligible for intervenor funding by virtue of the criteria set out in the bill. For this reason it is recommended that municipalities be granted equal opportunity to seek intervenor funding.

INTRODUCTION

On June 29, 1988, Bill 174, An Act for the establishment and conduct of a Project to provide Funding to Intervenors in proceedings before a Joint Board under the Consolidated Hearings Act, 1981 and before the Ontario Energy Board and the Environmental Assessment board and to provide for certain matters in relation to costs before those Boards (Intervenor Funding Project Act, 1988), received first reading in the Legislature. Bill 174 is an attempt by the Province to give some structure to a process which has been to this point ad hoc in nature; the funding of public interest intervenors in administrative approvals proceedings.

Bill 174 has two distinct but related purposes, each of which promotes the financing of public interest participation in hearings held before specified Boards and under specified Acts.

The principal purpose of Bill 174 is to establish a framework by which intervenor funding can be provided to eligible public interest groups, facilitating their participation in hearing before the Environmental Assessment Board (EAB), the Ontario Energy Board (OEB), and a Joint Board under the Consolidated Hearing Act, 1981.

Bill 174 also introduced some changes to the system of awarding costs at the conclusion of hearings. The bill empowers the Environmental Assessment Board to now award costs, as a Joint Board and the OEB currently are. In addition, Joint Boards, the EAB and the OEB may, under Bill 174, now award costs using considerations different from those used by the courts.

BILL 174

Funding Panel, Funding Proponents and Intervenor Funding

Bill 174 establishes the right of a person or group of persons who has been granted intervenor status before a board to apply to that board for intervenor funding. Where a request is made for intervenor funding, a single member of the board will be appointed as the hearing panel. In cases before a joint board, one member of the Ontario Municipal Board and one member of the Environmental Assessment Board will make up the funding panel.

Before hearing applications for funding, the panel will identify as "funding proponents" those individuals or parties who may be liable to fund any eligible intervenors. A proponent to be named as a funding proponent must be notified of the panel's intentions, and, if it objects, is entitled to a hearing before the panel. The bill also provides that the funding panel may conclude that no funding proponents exist.

In order for an issue before a board to be eligible for intervenor funding it must, in the opinion of the board, affect both a significant segment of the public, and affect the public interest and not just private interests. Presumably, if either of these conditions were not met, intervenor funding would not be made available.

Once an issue has been deemed to qualify for intervenor funding, and the funding proponents and intervenors have been identified, the funding panel may then consider applications for funding according to the eligibility criteria set out in Bill 174.

Eight factors must be considered by the funding panel in deliberating whether to award intervenor funding to an intervenor, ensuring that;

- the intervenor represents a clearly ascertainable interest;
- representation of the interest would contribute substantially to the hearing;
- the intervenor does not have sufficient financial resources to represent the interest;
- the intervenor has made reasonable efforts to raise funding from other sources;
- the intervenor has an established commitment to the interest;
- an attempt has been made to coordinate related interests into a single group;
- a clear proposal exists for the use of any funds;
- adequate controls exist to monitor the use of funds.

If the funding panel chooses to award intervenor funding to an intervenor, it must then determine the amount to be awarded. The bill sets out restrictions or limits to be applied to an award by the panel, including limiting the amount of eligible legal expenses to the legal aid rate, setting a ceiling on eligible disbursements (expert witness fees, administrative costs, etc.), and requiring that any other funds that become available to the intervenor be deducted from the award. In addition, the funding panel is given the discretionary power to attach conditions to the funding award.

With the amount of the award set, the funding panel draws up an order naming the funding proponent(s), the method of payment of the award (i.e. times and amounts of payment) and, where more than one funding proponent has been named, the proportion to be paid by each. The panel is given the discretion, where it is of the opinion that an award against a funding proponent would cause financial hardship, to refuse to order the award or to reduce the award.

Bill 174 also provides for supplementary funding, where an intervenor which has been awarded funding prior to a hearing has the opportunity at the conclusion of the hearing to apply to the board for additional funding. In this instance, the board must decide whether the original award was adequate. An intervenor who has received intervenor funding is not, however, eligible for an award of costs at the conclusion of a hearing in relation to the issues for which it received funding.

Post-Hearing Costs Awards

In addition to providing pre-hearing funding for intervenors, Bill 174 also revises some existing legislation with respect to post-hearing costs awards. Under the bill, joint boards are no longer limited to the considerations governing the awarding of costs in a court. The same applies to the Environmental Assessment Board and the Ontario Energy Board. The EAB is also empowered under Bill 174 to now award costs.

General

Bill 174 is considered a pilot project. The funding mechanism set out in Part I of the bill is to be repealed three years following its coming into force. The changes to matters relating to post-hearing costs however, are not to be repealed, and are thus permanent.

PAST AMO POSITION

In December, 1985 the Association of Municipalities of Ontario released a report outlining its position on the question of intervenor funding (see AMO Reports 85-7, Intervenor Funding and Cost Awards by Provincial Hearing Bodies). In the report, AMO supported the principle of public participation, and acknowledged that meaningful public input could be a useful contribution to the decision-making process.

The report also recognized that, in many cases, a municipality would be the proponent where a municipal project required the approval of a provincial hearing body. Where this was the case, the municipality could be faced with financing public input, including opposition to the project. Given the limited financial resource base of most municipalities, AMO's recommendations were aimed at supporting constructive public input while minimizing the cost to municipalities.

Briefly, AMO recommended:

1. That a fund should be established by the ministry responsible for the legislation under which the hearing is being held, and that advance funding or costs awards should be made from this fund only where it has been established that the decision process has been or will be enhanced.

2. That post-hearing costs awards should be the primary means of funding public input; and, that advance funding be considered only where it can be demonstrated that it is essential for the purposes of the hearings; and, where advance funding is being considered, that the funding decision not be made by the hearing body, but by the ministry responsible for the legislation or an office such as the Attorney General.

3. That all provincial hearing boards, task forces, commissions, etc. adopt funding criteria; and, that for costs awards, criteria be included requiring that participants have represented a substantial public interest, have made a worthwhile contribution to the resolution of the issues before the board and have carried out the intervention in a meaningful and efficient manner; and, that for advance funding, criteria be included indicating that advance funding be awarded only in those instances where it can be fully demonstrated that such funding is needed for the purposes of the intervention, that the intervening body has the ability and capacity to carry out its proposed intervention in a meaningful and efficient manner, and that the intervention will make a worthwhile contribution to the resolution of the issues at hand.

BILL 174 - COMPARISON WITH AMO POSITION

The Association's recommendations represent a generic response to the question of intervenor funding. Bill 174 proposes a defined mechanism for implementing intervenor funding. Fundamental differences become evident when AMO's position and Bill 174 are compared.

The two primary messages in the Association's position are that intervenor funding should be provided through post-hearing costs awards and that this funding should come from the ministry responsible for the legislation under which the hearing is being held.

Bill 174 however, proposes that funding be made available to intervenors prior to a hearing, and that the burden of financing eligible intervenors be placed on proponents.

The bill does include some provisions which more closely approximate AMO's recommendations. For example, eligibility criteria are set out which should confirm the eligibility of intervenors for advance funding, and which should ensure that the hearing process will benefit from the intervenors' participation.

Nevertheless, the Association's primary concerns remain; that funding for intervenors is to be provided in advance of a hearing, and that this funding is to be provided by the proponent.

Other Issues

In addition to the fundamental disparity between Bill 174 and AMO's position on intervenor funding, there are several other concerns raised by the proposed funding mechanism.

1. AMO's earlier position on intervenor funding considered a municipality only in the role of proponent. In the future, municipalities may increasingly be in a position ofopposition to private or provincial projects. The recent growth in the private waste management field and the potential application of the Environmental Assessment Act to all private sector waste management undertaking could precipitate instances where a municipality would seek to be an intervenor before the Environmental Assessment Board or a Joint Board. In these cases, were a municipality to attempt to seek intervenor funding under the provisions of Bill 174, the intervenor

funding criteria laid out in Section 7(2) of the Bill could prevent it from being considered eligible. Specifically, clause 7(2)(c) requires that the funding panel consider whether "the intervenor does not have sufficient financial resources to enable it to adequately represent the interest;". In the case of a municipality applying for intervenor funding, the municipality would have to establish that its financial base was insufficient to adequately represent its interest at a hearing. There is the possibility the hearing panel would consider a municipality fully capable of financing its case through its revenue base.

2. There are serious questions with respect to the term "proponent" within the bill. For the purposes of Bill 174, a proponent "...means a party whose undertaking, in the opinion of a funding panel, is the subject-matter of the hearing or another another party or individual or corporation, who, in the opinion of a funding panel, is potentially a major financial beneficiary of the decision of the board." The second half of Bill 174's definition of a proponent is very broad, and suggests that someone other than the individual who has actually brought theundertaking before the board could be subsequently named by the funding panel as a proponent, and be subject to the findings of the funding panel or the board. This has implications for municipalities, which may realize major financial benefits from the construction of large provincial projects, and could thereby be brought into the hearing as a named proponent. As a named proponent a municipality could be subsequently liable to contribute to the funding of any eligible intervenors.

3. In opting for emphasis on advance intervenor funding rather than post-hearing costs awards, Bill 174 attempts to facilitate the timely participation of affected parties in administrative approvals hearings. However, Section 3(4) provides that "...a board shall not commence a hearing until the funding panel for the hearing has advised the board that all applications for intervenor funding have been decided." Without a provision for an appropriate period of time between the awarding of funds and the commencement of the hearing, the funding mechanism proposed by Bill 174 is ineffective.

4. Under the provisions of Section 7(1) of the bill intervenor funding will be considered only in regard to issues that, in the opinion of the board, "...affect a significant segment of the public". This vague proviso begs the questions which "public" (a single community or the whole of the Province of Ontario?) and what constitutes a "significant" segment of this public? The bill should clearly set out what is meant by a "significant segment of the public".

CONCLUSION

The Association's previous position on intervenor funding recommended that funding of intervenors be provided primarily through post-hearing costs awards and that this funding should come from the ministry responsible for the legislation under which the hearing is held. The Association is concerned with the provisions of Bill 174, since it provides that intervenors will receive funds in advance of a hearing and that proponents will be responsible for funding intervenors.

Additionally though, the Association is concerned that, in the event that Bill 174 becomes legislation, municipalities may not be considered eligible for intervenor funding under the provisions of the bill.

RECOMMENDATION

That, with respect to Bill 174 - The Intervenor Funding Project Act, the Association of Municipalities of Ontario reaffirm its original position regarding intervenor funding. Furthermore, if the current bill becomes legislation, that the Association express its concern that municipalities be granted equal status to seek intervenor funding.

APPENDIX 1

Minority Report of the County and Regional Section

In its review of Bill 174 the County and Regional Section was concerned that the bill does not address the issue of the use of intervenor funding to duplicate work done by a proponent. The Section felt that it would be inappropriate for funds to be used in this manner, and that the use of intervenor funding should be limited to the review of work prepared by the proponent.

Recommendation

That Bill 174 include an explicit limitation on funding provided to intervenors, prohibiting the use of funds by intervenors for studies which would duplicate work done by proponents in support of a proposal.

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